(3)

FILED
NOV 6 1992
OFFICE OF THE CLERK

No. 92-626

In the Supreme Court of the United States
October Term, 1992

CATERPILLAR, INC,

Petitioner,

v.

MICHIGAN DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Respondent.

On Petition for Writ of Certiorari
to the Michigan Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Russell E Prins
Terry P. Gomoll
Assistant Attorneys General
Attorneys for Respondent

BEST AVAILABLE COPY

QUESTION PRESENTED

DO THE FORMER CAPITAL ACQUISITION DEDUCTION PROVISIONS OF THE MICHIGAN SINGLE BUSINESS TAX ACT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF CASE 1

REASONS FOR DENYING THE WRIT 16

A. THE FORMER CAD PROVISIONS WERE NOT FACIALLY DISCRIMINATORY 19

B. THE PETITION FOR WRIT OF CERTIORARI IS BASED UPON A CLASSIFICATION SCHEME WHICH IS NOT CONTAINED IN THE SINGLE BUSINESS TAX BUT WHICH HAS BEEN CREATED BY PETITIONER 21

C. THE COMMERCE CLAUSE DOES NOT MANDATE ANY PARTICULAR METHOD OF APPORTIONMENT 28

D. THE FORMER CAD FOR REAL PROPERTY PROVIDED A GREATER TAX BENEFIT TO INTERSTATE BUSINESSES 30

E. THE FORMER CAD FOR TANGIBLE PERSONAL PROPERTY DID NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE 34

F. WESTINGHOUSE IS NOT APPLICABLE TO THE FORMER CAD PROVISIONS 39

G. THE ISSUES RAISED BY PETITIONER ARE NO LONGER VIABLE 48

CONCLUSION 50

TABLE OF AUTHORITIES

Cases — Pages

Armco Inc v Hardesty,
467 US 638; 104 S Ct 2620;
81 L Ed 2d 540 (1984) 39

Complete Auto Transit, Inc v
Brady, 430 US 274; 97 S Ct 1076;
51 L Ed 2d 326 (1977) 15

Container Corp of America v
Franchise Tax Board, 463 US 159;
103 S Ct 2933; 77 L Ed 2d 545
(1989) 28

General Motors Corp v District of
Columbia, 380 US 553; 85 S Ct
1156; 14 L Ed 2d 68 (1965) 11

Goldberg v Sweet,
488 US 252; 109 S Ct 582;
102 L Ed 2d 607 (1989) .....passim

James B Beam Distilling Co v Georgia,
501 US ___; 111 S Ct 2439;
115 L Ed 2d 481 (1991) 49,50

Lehnhausen v Lake Shore Auto Parts,
410 US 356; 93 S Ct 1001;
35 L Ed 2d 351 (1973) 17

McKesson Corp v Division of
Alcoholic Beverages, 496 US 18;
110 S Ct 2238; 110 L Ed 2d 17
(1990) 49

Mobil Oil v Dept of Treasury,
422 Mich 473; 373 NW2d 730
(1985) 4

Pages

Moorman Mfg Co v Bair,
437 US 267; 98 S Ct 2340;
57 L Ed 2d 197 (1978) 28-29

New Energy Co v Limbach,
486 US 269; 108 S Ct 1803;
100 L Ed 2d 302 (1988) 18

Trinova Corporation v Michigan
Department of Treasury, 498 US
___; 111 S Ct 818; 112 L Ed 2d
884 (1991) .....passim

Westinghouse Electric Corp v
Tully, 466 US 388; 104 S Ct
1856; 80 L Ed 2d 388 (1984) .....passim

Wisconsin v J C Penney Co,
311 US 435; 61 S Ct 246;
85 L Ed 267 (1940) 17

Statutes

1991 Michigan Public Act 77 3,14

1991 Michigan Public Act 128 14

MCL 208.9; MSA 7.558(9) 31

MCL 208.23(a); MSA 7.558(23)(a) ...3,6,23

MCL 208.23(c); MSA 7.558(23)(c) ...3,6,23

MCL 208.23(e); MSA 7.558(23)(e) 37

MCL 208.31(2); MSA 7.558(31)(2) 37

MCL 208.31(5); MSA 7.558(31)(5) 37

MCL 208.35; MSA 7.558(35) 37

Pages

MCL 208.52; MSA 7.558(52) 35

MCL 208.77; MSA 7.558(77) 37

Constitution

US Const, art I, § 8, cl 3 12,18

Miscellaneous

Kasischke, Computation of the Michigan Single Business Tax: Theory and Mechanics, 22 Wayne L R 1069 (1976) 4,6-7

R. Kleine, Advisory Commission on Intergovernmental Relations, The Michigan Single Business Tax: A Different Approach to State Business Taxation, (1978) 3,4

STATEMENT OF CASE

In Trinova Corporation v Michigan Department of Treasury, 498 US ___; 111 S Ct 818; 112 L Ed 2d 884 (1991), this Court considered and rejected a constitutional challenge to the use of the three-factor apportionment formula with Michigan's value-added tax base. In Trinova the Court described the computation of the value-added tax base as follows, 112 L Ed 2d at 900-901:

> The Michigan SBT is an addition method VAT, although it inevitably permits various exclusions, exemptions, and adjustments that depart from the simple value added examples described above. Subject to exemptions contained at Mich Comp Laws § 208.35, Michigan SBT is levied against any person with "business activity" within the State of Michigan. Mich Comp Laws § 208.31(1) (1979). In order to calculate the amount of a taxpayer's SBT the taxpayer must, first, determine its total tax base. The total tax base consists of the taxpayer's value added, calculated by the addition method: Cost of Labor + Depreciation + Interest + Profit. Under Mich Comp Laws § 208.9 (1979), the taxpayer

begins with federal taxable income (representing profit), adds other elements that reflect consumption of labor and capital including compensation, depreciation, dividends, and interest paid by the taxpayer, and makes other detailed adjustments.

Second, if a taxpayer does business both within and without Michigan, it must determine the portion of its total value added attributable to Michigan. That portion, the crux of this case, is the average of three ratios: (1) Michigan payroll to total payroll, (2) Michigan property to total property, and (3) Michigan sales to total sales. Mich Comp Laws §§ 208.45, 208.46, 208.49, 208.51 (1979). The total tax base is multiplied by the portion of business activity attributable to Michigan activity (under the three-factor formula), and the result, subject to several further adjustments, is the taxpayer's "adjusted tax base." § 208.31(2).

Two further adjustments are relevant here: § 208.23(a), which permits a taxpayer to deduct a portion of its capital acquisitions, and § 208.31(5), which permits a labor-intensive taxpayer to reduce its adjusted tax base by a percentage equal to the percentage by which compensation exceeds 63% of the total tax base, but with such reduction not to exceed a maximum of 37%. Actual tax liability equals the adjusted tax base multiplied by a tax rate of 2.35%. (Emphasis added).

This case involves a constitutional challenge to the manner in which the capital acquisition deductions (CAD) were calculated for tangible personal property [MCL 208.23(a); MSA 7.558(23)(a)] and real property [MCL 208.23(c); MSA 7.558(23)(c)] prior to the amendment of the CAD provisions by 1991 Public Act 77 on July 16, 1991.

The Michigan SBT is not a pure VAT. In general, there are three types of value-added taxes--gross product, net income and consumption. R. Kleine, Advisory Commission on Intergovernmental Relations, The Michigan Single Business Tax: A Different Approach to State Business Taxation, p 5 (1978) (hereinafter Kleine). In a gross product VAT no deductions are allowed for the cost or

depreciation of capital assets. In an income-type value-added tax, annual depreciation deductions are allowed over the useful life of the asset, but no deduction is allowed when the asset is acquired. Mobil Oil v Dept of Treasury, 422 Mich 473, 496-497; 373 NW2d 730 (1985).

In a consumption-type value-added tax, the costs for capital acquisitions are allowed as a deduction when the capital assets are acquired, but no depreciation deductions are permitted. The Michigan SBT is a consumption-type VAT. Mobil Oil, supra, 422 Mich at 496. See Kasischke, Computation of the Michigan Single Business Tax: Theory and Mechanics, 22 Wayne L R 1069, 1082-1084 (1976), and Kleine, pp 5-6.

Inasmuch as the former CAD deduction was allowed after allocation and apportionment, i.e. a deduction from the apportioned Michigan tax base, some method was required to attribute the CAD deduction to Michigan business activity. The Michigan Supreme Court explained (Petitioner's Appendix at 9a):

> The deduction provided by the CAD is not applied to the tax base until after the tax base has been allocated or apportioned. MCL 208.23; MSA 7.558(23). Since the tax base after apportionment represents only Michigan business activity, only capital acquisitions related to Michigan business activity should qualify for treatment pursuant to the CAD. The CAD (subsections 23[a] and 23[c]) is designed to accomplish this result. Subsections 23(a) and 23(c) provide methods of apportioning a taxpayer's capital acquisitions so that only those acquisitions that relate to Michigan business activity are included in the CAD. Apportioning the CAD for tangible personal property is accomplished in subsection 23(a). Apportioning the CAD for real property is accomplished in subsection 23(c).

For real property the former CAD was apportioned to activities of the taxpayer within Michigan by limiting the deduction to real property "physically located in Michigan." MCL 208.23(c); MSA 7.558(23)(c). For tangible personal property the former CAD was apportioned to activities of the taxpayer within Michigan by multiplying the taxpayer's total costs for capital acquisition of tangible personal property by "a fraction, the numerator of which was the payroll factor plus the property factor and the denominator of which was 2." MCL 208.23(a); MSA 7.558(23)(a).

The two-factor fraction was used in order to relieve multistate businesses from burdensome accounting problems. In Kasischke, Computation of the Michigan

Single Business Tax: Theory and Mechanics, 22 Wayne L R 1069, 1083-1084 (1976), the author explained:

> The legislature recognized the practical problems involved in limiting the capital acquisition for tangible property to those assets located in Michigan, since this would involve determining where personal property is actually located and other burdensome accounting problems. Accordingly, the deduction for tangible personal property is limited to the cost of the asset multiplied by the average of the property and payroll factors. The practical effect of this computation is to determine which assets are Michigan and which are non-Michigan. Obviously, for a person taxable only in Michigan, a full deduction will result.
>
> Identifying Michigan and non-Michigan assets could have been accomplished by allowing the capital acquisition deduction before apportionment. The three factor apportionment formula rather than the two factor formula would then calculate the assets attributable to Michigan for the section 23 deduction. The theory behind the use of the payroll and property factors is that capital assets are likely to be located where the employees and other property are located; the sales factor is disregarded as it is unlikely to reflect

> the location of capital assets. Furthermore, the effect of using a two factor formula is to encourage Michigan investments.

The reason for using the two-factor apportionment formula was recognized in the Michigan Supreme Court's opinion (Petitioner's Appendix at 10a-11a):

> The theory behind the use of the two-factor apportionment formula in subsection 23(a) is that the acquisition of the capital is most likely to be located where a company's property and payroll (employees) are located.

Although the Petitioner was not contesting the actual application of the two-factor apportionment formula to its tangible personal property, the facts of this case confirmed the Legislature's reasoning. The use of the two-factor formula more closely approximated Petitioner's acquisition of tangible personal

property in Michigan than did the three-factor formula. For the years 1981 through 1984, Petitioner actually acquired tangible personal property for use in Michigan in the following amounts:

YEAR	MICHIGAN TANGIBLE PERSONAL PROPERTY
1981	$419,171
1982	$439,097
1983	$243,150
1984	$ 20,458

Using the two-factor fraction to estimate the amount of Petitioner's acquisition of tangible personal property in Michigan for the years 1981 through 1984, the following CAD was determined:

YEAR	CAD FOR TANGIBLE PERSONAL PROPERTY
1981	$235,577
1982	$235,646
1983	$158,733
1984	$ 76,896

If the three-factor apportionment formula had been used to estimate the amount of

Petitioner's acquisition of tangible personal property in Michigan, the estimated amounts would have been as follows:

YEAR	CALCULATION OF CAD FOR TANGIBLE PERSONAL PROPERTY USING THREE-FACTOR FORMULA	
1981	(416,023,969 x .003423)	$1,424,050
1982	(399,714,245 x .003554)	$1,420,584
1983	(248,084,087 x .005276)	$1,308,892
1984	(154,256,485 x .006339)	$ 977,832

As indicated by a comparison of the use of the two-factor formula and the three-factor apportionment formula for each year, the two-factor formula most nearly approximated the actual acquisition of capital assets for use within Michigan. While the actual amount of tangible personal property acquired in

Michigan exceeded the amount of the CAD calculated with the two-factor fraction in three out of four years, the amount calculated with the two-factor formula was much closer to the actual amounts than the amount calculated using the three-factor formula. The use of formulas need only achieve a "rough, practical, approximation." General Motors Corp v District of Columbia, 380 US 553, 561; 85 S Ct 1156; 14 L Ed 2d 68 (1965).

Because the SBT apportions the tax base by the standard three-factor apportionment formula but prior to the effective date of 1991 Public Act 77 used other methods to attribute the amount of the capital acquisition deduction related to Michigan business activities, Caterpillar claimed that the former

method of calculating the CAD discriminated against interstate commerce in violation of the Commerce Clause of the United States Constitution, art I, § 8, Clause 3. The Michigan Court of Claims determined that the former method of calculating the CAD discriminated against interstate commerce. To remedy this perceived constitutional violation, the Michigan Court of Claims determined that the CAD deduction should be disallowed for all taxpayers. The Court of Claims made its decision prospective only for all tax years beginning after September 30, 1989. (Final Judgment of the Court of Claims, Petitioner's Appendix at 113a).

Petitioner appealed both the remedy (disallowance of the deduction) and the

prospective application of the remedy to the Michigan Court of Appeals. In its opinion the Michigan Court of Appeals changed the remedy. Instead of disallowing the CAD deduction, the Court of Appeals eliminated the provisions which apportioned the CAD to Michigan business activities. The result of the Court of Appeals' opinion was to allow the costs for all capital acquisitions everywhere to be deducted without apportionment from an apportioned (i.e. Michigan) tax base. The Court of Appeals, however, affirmed the prospective application of the remedy (Opinion of the Court of Appeals, Petitioner's Appendix at 97a-101a).

Because of the immediate and drastic impact upon current and future SBT tax

revenues[1] and to forestall any further constitutional attack on the CAD provisions, within several months the Michigan Legislature amended the method of calculating the CAD deduction. 1991 Public Act 77. Subsequent adjustments were made to the amendment. 1991 Public Act 128.

Petitioner filed an Application for Leave to Appeal with the Michigan Supreme Court and Respondent filed a Cross-Application for Leave to Appeal. The Michigan Supreme Court granted leave and requested the parties to address the following three issues:

---

[1]The State Treasurer filed an affidavit in support of the State's Cross-Application for Leave to Appeal in the Michigan Supreme Court which stated that the decision of the Court of Appeals, which was issued on February 5, 1991, would reduce the SBT revenues for the fiscal year ending on September 30, 1991, by 350 million dollars and future SBT revenues by 500 million dollars per year.

(1) Whether, prior to the passage of 1991 PA 77, the capital acquisition deduction provisions in MCL 208.23(a) and (c); MSA 7.558(23)(a) and (c) violated U.S. Const, art I, § 8, cl 3; and, if so;

(2) Whether the lower courts erred by limiting the effect of their rulings to tax years beginning after September 30, 1989, and;

(3) What relief, if any, should the Plaintiff receive?

On July 31, 1992, the Michigan Supreme Court issued its decision. The majority opinion applied this Court's four-pronged test contained in Complete Auto Transit, Inc v Brady, 430 US 274, 279; 97 S Ct 1076; 51 L Ed 2d 326 (1977), and reversed the Court of Appeals. The majority opinion concluded that the former CAD provisions did not violate the Commerce Clause of the U.S. Constitution (Petitioner's Appendix at 1a-30a).

Two justices, Chief Justice Cavanagh and Justice Levin, dissented and determined that the former CAD provisions violated the Commerce Clause (Petitioner's Appendix at 31a-67a). Justice Brickley dissented in part, agreeing with the majority that the former CAD for real property was constitutional, but concluding that the former CAD for tangible personal property violated the Commerce Clause (Petitioner's Appendix at 72a-92a).

REASONS FOR DENYING THE WRIT

The provisions of Michigan's single business tax pertaining to the capital acquisition deductions which Petitioner challenged were amended by statute in 1991 so the challenge is no longer viable. Even if Petitioner's claim

retains some vitality, it is clear that the case does not involve any important undecided question of federal law, and it is clear that the Michigan Supreme Court has not decided any federal question in a way that conflicts with the decision of another state court of last resort, of a United States Court of Appeals, or of this Court. Supreme Court Rule 10.1(a), (b).

A statute is presumed constitutional absent a clear showing to the contrary. Lehnhausen v Lake Shore Auto Parts, 410 US 356; 93 S Ct 1001; 35 L Ed 2d 351 (1973). In the realm of state taxation, state legislatures have great discretionary latitude in formulating taxes. Wisconsin v J C Penney Co, 311 US 435, 444-445; 61 S Ct 246; 85 L Ed 267 (1940).

One of the constitutional restrictions upon the taxing power of the states is the Commerce Clause of the U.S. Constitution (art I, § 8, cl 3). The "negative" aspect of the Commerce Clause

> ...prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. (citations omitted). Thus state statutes that clearly discriminate against interstate commerce are routinely struck down, (citation omitted). (Emphasis added). New Energy Co v Limbach, 486 US 269, 273-274; 108 S Ct 1803; 100 L Ed 2d 302 (1988).

The crucial distinction is whether the state tax scheme, by design or result, protects local business at the expense of out-of-state competitors and discriminates in favor of in-state economic interests at the expense of out-of-state competitors. Goldberg v Sweet, 488

US 252, 266; 109 S Ct 582; 102 L Ed 607 (1989). The former CAD provisions did not, by design or result, protect local business at the expense of out-of-state competitors.

A. THE FORMER CAD PROVISIONS WERE NOT FACIALLY DISCRIMINATORY.

In Trinova Corp v Michigan Dept of Treasury, supra, this Court rejected the taxpayer's Commerce Clause challenge to the Single Business Tax Act because " ... Trinova cannot point to any treatment of in-state and out-of-state firms that is discriminatory on its face, as in the cases it cites." 112 L Ed 2d at 911. With regard to the taxpayer's criticism that "the SBT was enacted 'to promote the development and investment of business within Michigan,'" 112 L Ed 2d at 912, this Court commented:

> ... This statement helps Trinova not at all. It is a laudatory goal in the design of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state. States are free to "structur[e] their tax systems to encourage the growth and development of intrastate commerce and industry. Boston Stock Exchange, supra, at 336-337, 50 L Ed 2d 514, 97 S Ct 599. (Emphasis added).
> 112 L Ed 2d at 912.

The former CAD did not protect local businesses at the expense of out-of-state competitors. The CAD provisions did not distinguish between local businesses and interstate commerce. The deduction for real property was available for any business, interstate or domestic, which acquired real property in Michigan during the tax year. The CAD for tangible personal property was also available to both domestic and interstate businesses.

On their face the former CAD provisions provided no different treatment for

intrastate and interstate commerce. They did not violate the Commerce Clause prohibition against economic protectionism.

B. THE PETITION FOR WRIT OF CERTIORARI IS BASED UPON A CLASSIFICATION SCHEME WHICH IS NOT CONTAINED IN THE SINGLE BUSINESS TAX BUT WHICH HAS BEEN CREATED BY PETITIONER.

In Petitioner's Statement of the Case (Petitioner's Writ at 3), Petitioner asserts that the former provisions of the single business tax are facially discriminatory. However, as this Court noted in Trinova, Caterpillar cannot point to any provisions of the single business tax which treat in-state and out-of-state companies in a manner which is discriminatory on its face. 112 L Ed 2d at 911. Instead, Petitioner has created its own arbitrary classification scheme to support its claim of facial discrimination.

The majority opinion in the Michigan Supreme Court explained Caterpillar's definition of "Michigan based companies" and "non-Michigan based companies" as follows (Petitioner's Appendix at 3, footnote 4):

> Caterpillar's term "Michigan-based" company means a multistate company with the predominant part of its facilities and employees in Michigan in comparison to its sales. The term "non-Michigan based" company refers to a multistate company with large out-of-state operations (companies whose facilities and employees in Michigan are less predominant in comparison to its sales in the state). Neither term describes a Michigan company that operates exclusively within the state - an intrastate company.

There are at least five deficiencies in Petitioner's classification system. First of all, no decisions of this Court permit a taxpayer to create an allegedly discriminatory classification scheme

which is not embodied within the provisions of the state taxing act. Second, the Michigan Single Business Tax Act does not contain such a distinction. There was no reference in the single business tax, either in the former CAD provisions [MCL 208.23(a) and (c)] or elsewhere, to "Michigan based" or "non-Michigan based" companies.

Third, as recognized by the Michigan Supreme Court, this is not a distinction between "intrastate" or local Michigan businesses and interstate businesses. Both of Petitioner's groups are, by Petitioner's own definition, companies engaged in interstate commerce. Petitioner's distinction is between one group of businesses in interstate commerce and another group of companies engaged in

interstate commerce. As indicated by the Michigan Supreme Court, Petitioner's classification scheme does not include a Michigan company that operates exclusively within the state.

Fourth, the label of "Michigan based company" is a misleading misnomer. The label suggests businesses with a large portion of their activity in Michigan. That intimation is not true. The label merely refers to a company "with a predominant part of its facilities and employees in Michigan as compared to its sales in Michigan." Under Petitioner's definition, "Michigan based companies" would include not only an interstate business with 90% of its employees and property in Michigan and a smaller percentage of Michigan sales, but also an

interstate business with only 2% of its property and payroll in Michigan but having a smaller percentage of sales in Michigan. Conversely, under Petitioner's definition an interstate business with 80% of its property and payroll in Michigan would not be a "Michigan-based company" if its Michigan sales were 90% of its total sales.

Finally, Petitioner's definition of "Michigan based companies" and "non-Michigan based companies" is ambiguous. There is no criteria for determining when a company's facilities and employees in Michigan are predominant as compared to its sales in Michigan. Is this to be determined merely by reference to its apportionment factors or to the total cost of its Michigan facilities and pay-

roll in comparison to the total dollar amount of its Michigan sales or by reference to some other criteria? Moreover, should "predominant" mean a significant difference or merely the largest?

The Petition for Writ of Certiorari is premised upon this artificial and ambiguous classification scheme created by Petitioner. Under this approach any taxpayer could demonstrate discrimination against interstate commerce by fashioning an appropriate definition.

The hypotheticals contained in the dissenting opinion of Chief Justice Cavanagh, upon which Petitioner places much reliance, are equally flawed. In Hypothetical I (Petitioner's Appendix 68a) for the non-Michigan based company, after the investment of property within

Michigan, the percentage of its business activity conducted in Michigan, as determined by the three-factor formula, was 51.11%. In Hypothetical II (Petitioner's Appendix 70a) for the Michigan based company, after the investment in Michigan, the percentage of its business activity in Michigan, as determined by the three-factor formula, was 50.48%. Although the former actually conducted more business activity in Michigan, Petitioner and Justice Cavanagh refer to the latter as the "Michigan based company."

If "Michigan based company" were defined as a company which had more than 50% of its business activity in Michigan, as determined by the three-factor formula, and which had more than 50% of

its sales in Michigan (which is more logical than Petitioner's definition), the results illustrated in Justice Cavanagh's hypotheticals would be reversed.

C. THE COMMERCE CLAUSE DOES NOT MANDATE ANY PARTICULAR METHOD OF APPORTIONMENT.

Petitioner complains that the use of the three-factor formula to apportion tax base and the use of other methods of apportionment to determine the CAD discriminates against interstate commerce. This Court has firmly established that it will not mandate any particular method of apportionment. Goldberg v Sweet, 488 US 252, 261; 109 S Ct 582; 102 L Ed 2d 607 (1989); Container Corp of America v Franchise Tax Board, 463 US 159, 169; 103 S Ct 2933; 77 L Ed 2d 545 (1989); Moorman

Mfg Co v Bair, 437 US 267; 278-280; 98 S Ct 2340; 57 L Ed 2d 197 (1978). In Goldberg v Sweet, the Court stated:

> But "we have long held that the Constitution imposes no single [apportionment] formula on the States," (citation omitted) and therefore have declined to undertake the essentially legislative task of establishing a "single constitutionally mandated method of taxation." 488 US at 261.

The Respondent's former method of apportioning the CAD deductions to a taxpayer's business activities within Michigan was somewhat analogous to the State of Illinois' method of attribution in Goldberg. Under its tax upon interstate telecommunications, Illinois taxed only those calls which "(1) originated or terminated in Illinois and (2) were charged to an Illinois service address." 488 US at 262. Not only did the Court

conclude that the tax was fairly apportioned, it also rejected the taxpayer's claim that Illinois' method of apportionment discriminated against interstate commerce. 488 US at 266. In this matter, Petitioner has not attacked the fairness of the apportionment method used to apportion the CAD to its Michigan business activities (see pp 8-11, supra), but has, like the taxpayers in Goldberg, claimed that such a method of apportionment discriminates against interstate commerce. This Court's prior decisions do not require that the CAD provisions use the same apportionment method used to attribute the tax base.

D. THE FORMER CAD FOR REAL PROPERTY PROVIDED A GREATER TAX BENEFIT TO INTERSTATE BUSINESSES.

The former CAD for real property actually favored and gave a competitive

advantage to multistate businesses. For example, let us assume two hypothetical corporations in the same business which both have a tax base as defined in section 9 [MCL 208.9; MSA 7.558(9)] of $100,000,000. Corporation A is a local (intrastate) Michigan corporation with all of its activities in Michigan. Corporation B, on the other hand, has only 5% of its activities in Michigan (i.e. its average apportionment factor is .05). If both of these competitors acquired real property in Michigan as a capital acquisition in the amount of $10,000,000, Corporation B (the multistate taxpayer) received a much greater tax benefit from the deduction. The calculations are as follows:

	Local Corporation A	Multistate Corporation B
Tax Base	100,000,000	100,000,000
Apportionment Factor	x 1.00	x .05
Apportioned Tax Base	100,000,000	5,000,000
CAD for Real Property Acquired in Michigan	-10,000,000	-10,000,000
Amount on which tax is imposed or business loss carryover	90,000,000	-5,000,000

For the local Michigan business, the former CAD for real property reduced the amount of its tax base subject to tax by 10% (100,000,000 - 10,000,000). For the multistate business, the former CAD for real property had a much greater impact which was inversely related to the amount of business activity which it conducted

in Michigan--i.e. the smaller the proportion of business activity in Michigan, the greater the benefit of the CAD. In this case the multistate taxpayer's SBT liability was completely eliminated, and it had a $5,000,000 business loss carryover.

Petitioner argues that the former CAD for real property violated the Commerce Clause because it unconstitutionally encouraged investment in Michigan. The CAD was invalid only if it discriminated against interstate commerce. Analysis of the effect of the CAD for real property clearly shows that it discriminated in favor of multistate businesses and benefited multistate businesses inversely to the amount of business activity conducted within Michigan. Discrimination in favor

of multistate business is constitutionally valid since the Commerce Clause is not concerned with and does not protect local intrastate business. Goldberg v Sweet, 488 US at 266.

E. THE FORMER CAD FOR TANGIBLE PERSONAL PROPERTY DID NOT DISCRIMINATE AGAINST INTERSTATE COMMERCE.

Although the former CAD for tangible personal property did not discriminate in favor of interstate commerce, neither did it discriminate against interstate commerce. The application of the two-factor formula merely limited the amount of the CAD to a proportion of business activity attributable to Michigan similar to the way in which the three-factor apportionment formula attributes a portion of the total tax base (value-added) of a multistate taxpayer.

The former CAD for personal property benefited some multistate taxpayers in comparison to local businesses (intrastate businesses) but disadvantaged other multistate businesses. For all multistate taxpayers, whether the percentage of their business activity in Michigan (as determined by the three-factor formula) was over 90% or under 1%, when the average of their property and payroll factors exceeded their sales factor the CAD for personal property resulted in a lower effective tax rate than for intrastate Michigan businesses.[2] For other

---

[2]This beneficial effect was offset somewhat by the throwback sales provision of the SBT. Sales shipped from a place in Michigan are Michigan sales for purposes of apportionment if the business is not taxable in the state of the customer. MCL 208.52; MSA 7.558(52). Some states with income taxes protect local industry by excluding throwback sales from the numerator of the sales factor of the apportionment formula.

multistate taxpayers whose sales factor was greater than the average of the property and payroll factor, the effect of the CAD for personal property was less beneficial, and they had a higher effective tax rate (all other factors being equal) than the first group of multistate taxpayers and intrastate Michigan taxpayers.

The fact that the former CAD for personal property resulted in a higher effective tax rate for some multistate businesses in comparison to other multistate taxpayers does not mean that it discriminated in favor of intrastate com-

merce and against interstate commerce.[3]

---

[3]If a deduction or adjustment were unconstitutional because it benefited some multistate taxpayers and not others, then any adjustments would be unconstitutional. For example, the SBT has numerous provisions which affect the tax liability and effective tax rate for both intrastate and interstate businesses. Such provisions include (1) the business loss deduction [MCL 208.23(e); MSA 7.558(23)(e)]; (2) the excess compensation deduction [MCL 208.31(5); MSA 7.558(31)(5)]; (3) the small business exemption [MCL 208.35; MSA 7.558(35)]; (4) the gross receipts limitation or adjustment [MCL 208.31(2); MSA 7.558 (31)(2)]; and (5) the consolidated or combined return provision [MCL 208.77; MSA 7.558(77)]. All of these provisions affect the SBT liability and effective tax rate of both intrastate and interstate businesses in different degrees. For those taxpayers, both intrastate and interstate, who benefit from such provisions, their effective tax rate is reduced. For others the provisions provide no benefit.

The former CAD for personal property operates in the same manner. For some multistate taxpayers it provided a benefit which was even greater than the benefit for intrastate taxpayers. For other multistate taxpayers the benefit was not as advantageous.

In fact, the group which benefited the most from the calculation of the former CAD for tangible personal property was not intrastate Michigan businesses, but those interstate businesses which had a higher preponderance of property and payroll rather than sales in Michigan. This group included any interstate business, whether 99% or less than 1% of its property and payroll was in Michigan, as long as the average of the property and payroll factor was greater than the sales factor.

As was recognized by the Michigan Supreme Court, one of the purposes of the CAD was to promote investment in Michigan (Petitioner's Appendix at 24a). The CAD encourages the acquisition of capital assets in Michigan by both local business

and interstate business. Encouragement of investment in Michigan by a means which does not discriminate against interstate commerce poses no constitutional problem. Armco Inc v Hardesty, 467 US 638, 646; 104 S Ct 2620; 81 L Ed 2d 540 (1984); Trinova, supra, 112 L Ed 2d at 912.

F. WESTINGHOUSE IS NOT APPLICABLE TO THE FORMER CAD PROVISIONS.

Petitioner relies primarily upon Westinghouse Electric Corp v Tully, 466 US 388; 104 S Ct 1856; 80 L Ed 2d 388 (1984). Westinghouse, however, is nothing more than a case of facial discrimination against interstate commerce. In Trinova, this Court distinguished the SBT from the discrimination in Westinghouse in writing:

> Trinova also urges that the Michigan SBT should be struck down because it discriminates against out-of-state businesses in violation of the Commerce Clause. Trinova cannot point to any treatment of in-state and out-of-state firms that is discriminatory on its face, as in the cases it cites. See, e.g., Westinghouse Electric Corp. v Tully, 466 US 388, 393, 80 L Ed 2d 388, 104 S Ct 1856 (1984) (tax credit was limited to gross receipts from export products shipped from a regular place of business of the taxpayer within New York); Boston Stock Exchange v State Tax Comm'n, 429 US 318, 324. (Emphasis added). 112 L Ed 2d at 911.

Westinghouse was a clear case of "economic protectionism" in which the tax credit was designed to protect the New York exporting businesses. The tax credit protected those businesses already in New York which shipped exports from New York. 466 US 406-407. This Court explained:

> ... The DISC credit, significantly, is limited to gross receipts from export products "shipped from a regular place of business of the taxpayer

> within [New York]." § 210.13(a)(2). 466 US at 393.
>
> ... When a tax, on its face, is designed to have discriminatory economic effects, the Court "need not know how unequal the Tax is before concluding that it unconstitutionally discriminates." Maryland v Louisiana, 451 US, at 760,68 L Ed 2d 576, 101 S Ct 2114. (Emphasis added).
> 466 US 406-407.

Unlike the New York franchise tax credit, the former CAD provisions were not discriminatory on their face. The tax benefit of the CAD was not confined to local business. Instead, the CAD seeks to attract new investment in Michigan, both local and interstate. This distinction is critical. Protecting existing local business by reducing its tax burden is not permitted, but attracting new businesses (local and interstate) through investment incentives is permissible.

The New York franchise tax credit was a form of economic protectionism; the CAD is an investment incentive. In Trinova this Court applauded the "... laudatory goal ... of a tax system to promote investment that will provide jobs and prosperity to the citizens of the taxing state." 112 L Ed 2d at 912.

There are other significant distinguishing factors between Westinghouse and this case. In Westinghouse the Court focused upon the fact that increased export sales from New York resulted in lower effective tax rates for the exporter. The corporation with the most export sales from New York would have the lowest effective tax rate. 466 US 400, n 9.

In contrast, the former CAD for real property reduced the effective tax rate

for any taxpayer making such an investment and the tax benefit of the CAD, unlike the credit in Westinghouse, was inversely proportional to the amount of business activity conducted in Michigan. The interstate business with the least amount of activity in Michigan had the lowest effective tax rate.

For tangible personal property, because the Legislature provided for the two-factor formula to apportion the CAD instead of requiring detailed accounting, a multistate business received a CAD for tangible personal property without actually investing in such property within Michigan. Unlike Westinghouse personal property acquisitions anywhere were eligible. That is exemplified in this case. In 1984, Petitioner actually

acquired only $20,458 of tangible personal property in Michigan. But by using the two-factor formula, Petitioner was allowed a CAD in the amount of $78,896. Accordingly, unlike Westinghouse where the tax credit was tied to New York export activity, the CAD for personal property was not tied to acquisitions for use in Michigan.

The greatest benefit of the former CAD for personal property (in terms of reducing the effective tax rate) was not for local intrastate businesses but for those interstate businesses with an average of Michigan property and payroll factors which was greater than the sales factor. This benefit applied whether an interstate business had 90%, 50%, 10% or only 1% of its total business activity in

Michigan (as measured by the three-factor formula).

Finally, in Westinghouse, the statutory deficiency was not that the credit was apportioned but that after the credit was apportioned, it was further limited to benefit those parent corporations whose domestic international sales corporation (DISC) exported from New York. The Court explained:

> ... In computing the allowable credit, the statute requires the parent to factor in its business allocation percentage. § 210.13(a). This procedure alleviates the State's fears that it will be overly generous with its tax credit, for once the adjustment of multiplying the allowable DISC export credit by the parent's business allocation percentage has been accomplished, the tax credit has been fairly apportioned to apply only to the amount of the accumulated DISC income taxable to New York. From the standpoint of fair apportionment of the credit, the additional adjustment of the credit to reflect the DISC's New York export ratio is both inaccurate and duplicative.

> It is this second adjustment, made only to the credit and not to the base taxable income figure, that has the effect of treating differently parent corporations that are similarly situated in all respects except for the percentage of their DISC's shipping activities conducted from New York.
> 460 US at 399-400.

It is this second adjustment, which was intentionally designed to protect the New York exporting business, that was constitutionally deficient. The previous statutory scheme in the instant case was not the same. As indicated in the majority opinion of the Michigan Supreme Court, "[s]ubsections 23(a) and 23(c) provide methods of apportioning a taxpayer's capital acquisitions so that only those acquisitions that relate to Michigan business activity are included in the CAD." (Petitioner's Appendix at 9a). Here there was nothing analogous to

Westinghouse's "second adjustment" which was designed to protect a Michigan business or a Michigan product.

It was true that as a corporation increased its Michigan payroll and property, it received a larger CAD for tangible personal property. But that result would also occur with the use of a three-factor formula. Even Chief Justice Cavanagh in his dissenting opinion recognized that the same result would occur with the three-factor formula. (Petitioner's Appendix at 51a, footnote 20). The same result would also occur under the constitutionally valid method of apportioning the credit in Westinghouse. As the parent corporation in Westinghouse increased its business allocation percentage in New York, it would receive a

larger export credit--without even applying the invalid second adjustment.

G. THE ISSUES RAISED BY PETITIONER ARE NO LONGER VIABLE.

Even if there ever had been a substantial question of federal law, it no longer exists. Petitioner challenged the constitutionality of the former CAD provisions because different methods of apportionment were used than were used to apportion the tax base. Because the statute was amended in 1991, that difference no longer exists. Because of the drastic reduction of SBT tax revenues caused by the decision of the Michigan Court of Appeals,[4] the Michigan Legis-

---

[4]After the decision of the Michigan Court of Appeals, taxpayers began filing SBT returns utilizing the unapportioned CAD as a deduction from their apportioned tax base, severely reducing reported tax liability.

lature was forced to amend the method of calculating the CAD deductions. Now the formula for apportioning tax base is also used to apportion the CAD deductions.

In its Petition for Writ of Certiorari, Petitioner requests that this Court reverse the Michigan Supreme Court and apply its decision retrospectively. Even if this Court considered the constitutionality of the former CAD provisions, questions concerning the proper remedy and the retrospective application of that remedy would not be appropriate issues before this Court. Those issues, if it were necessary to address them, would first have to be resolved by the Michigan Supreme Court. McKesson Corp v Division of Alcoholic Beverages, 496 US 18; 110 S Ct 2238; 110 L Ed 2d 17 (1990); James B

Beam Distilling Co v Georgia, 501 US ___; 111 S Ct ___; 115 L Ed 2d 481 (1991).

CONCLUSION

Although this Court has already observed that "... Trinova cannot point to any treatment of in-state and out-of-state firms that is discriminatory on its face... ." (Trinova, 112 L Ed 2d at 911), Petitioner maintains that the unique method which was previously used to apportion the CAD deductions to Michigan business activity violated the Commerce Clause by discriminating against inter-state commerce. Petitioner's analysis is erroneous. It is based upon a classification scheme which does not exist in the Single Business Tax Act but which has been created solely by Petitioner.

Neither the former CAD for real property nor the former CAD for tangible personal property discriminated against interstate commerce. Indeed, a proper analysis reveals that the CAD for real property, and to some degree, the CAD for tangible personal property, were more beneficial to multistate business, or a group of multistate businesses, than to intrastate Michigan businesses.

Petitioner has already achieved part of its goal and the issues which it raises are moot. The Michigan Legislature has already amended the method of calculating the CAD deductions.

The Michigan Supreme Court's opinion is consistent with decisions of this Court which apply the Commerce Clause limitations to state taxation. For these

reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FRANK J. KELLEY
Attorney General

Thomas L. Casey
Solicitor General
Counsel of Record
P. O. Box 30212
Lansing, Michigan 48909
(517) 373-1124

Russell E Prins
Terry P. Gomoll
Assistant Attorneys General

Attorneys for Respondent

Dated: November 6, 1992